No. 455

In the Supreme Court of the United States

OCTOBER TERM, 1957

UNITED STATES OF AMERICA, APPELLANT

v.

ROMUALDO CORES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

JURISDICTIONAL STATEMENT

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CITATIONS

438175—57

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OPINION BELOW

The District Court did not file an opinion. A transcript of the proceedings in which the court orally dismissed the information is set forth in Appendix A, *infra*, pp. 9–10.

JURISDICTION

On June 24, 1957, the District Court for the District of Connecticut orally dismissed the information (App. A, *infra*, pp. 9–10) on the authority of its decision in *United States* v. *Tavares*, decided May 6, 1957, in which it had ruled that "remaining" in the United States in violation of 8 U. S. C. 1282 (c) was not a continuing offense which could be prosecuted in any district where an alien crewman was found (App. B,

infra, pp. 11–13).[1] A notice of appeal to this Court was filed in the District Court on July 17, 1957. The jurisdiction of this Court to review on direct appeal an order dismissing an information, based on a construction of the statute upon which the information rests, is conferred by 18 U. S. C. 3731. *United States* v. *Anderson*, 328 U. S. 699, 700–701.

QUESTION PRESENTED

Whether an alien crewman who wilfully and knowingly remains in the United States in excess of the number of days allowed by a conditional permit, in violation of 8 U. S. C. 1282 (c), is guilty of a continuing offense which may be prosecuted in the district where such crewman is found after expiration of the period fixed in the permit.

STATUTE INVOLVED

Section 252 of the Immigration and Nationality Act of 1952, 66 Stat. 220 (8 U. S. C. 1282) provides:

* * * * *

> (c) Any alien crewman who willfully remains in the United States in excess of the number of days allowed in any conditional permit issued under subsection (a) shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not more than $500 or shall be imprisoned for not more than six months, or both.

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[1] A copy of the decision in *Tavares* is set forth in Appendix B, *infra*, pp. 11–13. No appeal was taken because a collateral issue was involved as to whether jeopardy had attached.

STATEMENT

In a single count information filed in the United States District Court for the District of Connecticut, appellee, an alien crewman, was charged with wilfully and knowingly remaining in the United States in excess of the number of days allowed by his landing permit, in violation of 8 U S. C. 1282 (c), *supra*.

On June 24, 1957, the District Court dismissed the information for lack of venue jurisdiction on the authority of its decision in *United States* v. *Tavares* (App. B, *infra*, pp. 11–13). In *Tavares* the court held that the crime of remaining in the United States beyond the permitted time occurred in the district where the crewman was at the time when his permit expired, and was not a continuing crime which could be prosecuted in any district where the crewman was later found.

THE QUESTION IS SUBSTANTIAL

8 U. S. C. 1282 provides for the granting, to alien crewmen, of conditional permits to land temporarily in the United States. Subsection (c) of Section 1282 provides punishment for any alien crewman convicted of wilfully remaining in the United States in excess of the number of days allowed in his conditional permit. In dismissing the information for lack of venue jurisdiction, the court below ruled that the crime of remaining in the United States does not occur whenever and wherever the alien remains after his time has expired, but presumably only when and where his ship sails without him. In practical effect, this means that the alien cannot be prosecuted where he is actually residing, if, as appears to be the common

case, he has left the district from which his ship has sailed. Such a ruling is contrary to the ordinary meaning of the words of the statute and opposed to its purpose. Review by this Court, under the Criminal Appeals Act, is warranted by the recurring nature of the crime of desertion by seamen and the potential incidence in that connection of the problem posed by the decision below.

1. Congress undertook to punish "[a]ny alien crewman who *wilfully remains* in the United States in excess of the number of days allowed in any conditional permit * * *." (Emphasis added.) "Remain" is defined (*Webster's New International Dictionary* (2d ed., unabridged), p. 2106) as "to continue unchanged in place, form, or condition * * *; to abide; endure; last; continue." In the ordinary meaning of the word, the alien crewman "remains" in the United States in violation of law each day he is here after the expiration of his permit.

The Congressional objective accords with the ordinary meaning; the crime proscribed by Section 1282 (c) was intended to be a continuing offense punishable in any district in which the alien "remained". The Congressional purpose was to discourage the unlawful presence of alien crewmen in this country. Cf. *United States* v. *Alvarado-Soto,* 120 F. Supp. 848, 850 (S. D. Cal.). The stated aim was to "insure that members of the crews of vessels or aircraft entering the ports or airports of the United States from foreign places will depart the United States, while at the same time, permitting the crew members to land temporarily for such periods of time as is necessary

to maintain normal operations in the conduct of foreign commerce." H. Rep. No. 1365, 82d Cong., 2d sess., p. 66; S. Rep. No. 1137, 82d Cong., 2d sess., p. 35. In discussing the section, Representative Walter pointed out that at that time there were 200,000 aliens illegally in the Atlantic seaboard states alone. In answering objections to penalties imposed upon shipping interests when alien crewmen "jump ship", Representative Walter said that many of those aliens came as seamen and voiced his concern over the necessity of preventing such an influx. Joint Hearings before the Subcommittees of the Committees on the Judiciary, 82d Cong., 1st sess., on S. 716, H. R. 2379, and H. R. 2816, Bills to Revise the Laws Relating to Immigration, Naturalization, and Nationality, pp. 156–157. Since it was the unlawful continued presence of the alien in this country that Congress desired to discourage, that was what Congress intended to punish.

2. The act of "remaining" under Section 1282 (c) has all the attributes of a continuing offense. In *United States* v. *Midstate Co.*, 306 U. S. 161, 166, this Court adopted the following definition of a continuing offense: 'A continuing offense is a continuous, unlawful act or series of acts set on foot by a single impulse and operated by an unintermittent force, however long a time it may occupy". The act of wilfully remaining in the United States is a continuous, unlawful act initiated by the original act of remaining at the instant the permit expired and continuing until the alien leaves the country. See *In re Snow*, 120 U. S. 274, 281, where the Court held that cohabitation "is, inherently, a continuous offence, having duration; and

not an offence consisting of an isolated act." Remaining, like cohabiting, has duration as long as it continues uninterrupted. The mere fact that an offense can be made out at the inception of the act does not preclude the act from continuing beyond its inception.

Other comparable examples of continuing offenses include cases involving the failure to register under the various universal military training statutes. The Acts themselves did not make the failure to register a continuing offense, but regulations adopted pursuant to the Acts set the time and place for registration and made it a continuing obligation if one failed to register at the time appointed. The courts held that, since the duty to register was a continuing obligation, failure to register was a continuing offense. *McGregor* v. *United States,* 206 F. 2d 583 (C. A. 4); *Fogel* v. *United States,* 162 F. 2d 54 (C. A. 5), certiorari denied, 332 U. S. 791. Even in the absence of the explicit term "remains", it could hardly be contended under the instant statute that an alien crewman's obligation to leave the country ends on the date his permit expires. His duty to leave continues as long as he remains here. Therefore, under the rationale of the draft registration cases, remaining here is a continuing offense, the duty to leave being comparable to the duty to register. Similarly, the failure of an alien to register under a statute which required him to register if he remained in the United States for thirty days or longer has been held to be a continuing wilful violation of the law. *United States* v. *Franklin,* 188 F. 2d 182, 187 (C. A. 7).

3. Despite the difference between the meaning of the

word "entry" and the word "remains", the court below held that, since the "entry" of aliens had never been regarded as a continuing crime, neither should the crime of "remaining".[2] The court further reasoned that Congress did not intend "remaining" under Section 1282 (c) to be a continuing offense because 8 U. S. C. 1329[3] failed to mention Section 1282 (c) when it specifically made crimes under Sections 1325 (false entry of aliens) and 1326 (reentry of deported aliens) punishable where the alien was apprehended. This reasoning is not persuasive because "entry" crimes, not having duration or importing continuity, would not appear to be continuing and consequently have not been held to be such.[4] The finality of an entry is plain once it has been accomplished, but finality does not attach to the act of remaining until one no longer "remains". Congress, therefore, had good cause to specify that "entry" crimes should be deemed to extend so as to be punishable at the place of apprehension, whereas there was no reason to insert a like provision in regard to the crime of "remaining" because, as an inherently continuing act, it would normally occur where the alien was apprehended. Indeed, the fact that "entry" crimes were made punishable at the place of apprehension by 8 U. S. C. 1329

[2] *United States* v. *Tavares*, App. B, *infra*, p. 12.

[3] Section 279 of the Immigration and Nationality Act of 1952 (66 Stat. 230).

[4] See *United States* v. *Vasilatos*, 209 F. 2d 195 (C. A. 3); *Lazarescu* v. *United States*, 199 F. 2d 898 (C. A. 4). But see *United States* v. *Alvarado-Soto*, 120 F. Supp. 848, 850 (S. D. Cal.), holding that the violation of that part of 8 U. S. C. 1326 making it a crime to be "found in the United States" after having been deported was a continuing offense.

is itself an indication of the broad Congressional purpose to punish the unlawful presence of aliens in this country and not merely the isolated acts of "entering" or, as in this case, failing to depart according to the terms of a conditional permit.

CONCLUSION

It is respectfully submitted that the decision below is erroneous, and that the Court should take jurisdiction of this appeal.

J. LEE RANKIN,
Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
BEATRICE ROSENBERG,
ALBERT M. CHRISTOPHER,
Attorneys.

SEPTEMBER 1957.

APPENDIX A

United States District Court for the District of Connecticut

Criminal No. 9500

UNITED STATES OF AMERICA

vs.

ROMUALDO CORES

June 24, 1957

Before Honorable J. JOSEPH SMITH, Chief Judge.

Appearance:

For the Government: Simon S. Cohen, Esq., U. S. Attorney. By Harry W. Hultgren, Jr., Assistant U. S. Attorney.

For the Defendant: Warren A. Luedecker, Esq.

Mr. HULTGREN. I would like to draw the Court's attention that he stayed in New York for about a year before coming to Connecticut.

The COURT. In that case, in view of the ruling on the Tavares Case, I feel that he should be permitted to withdraw his plea.

Mr. HULTGREN. I submit it is a matter of venue and he has to press that question before any plea or trial. There is no question that this is a violation.

The COURT. Isn't there a question as to the jurisdiction of the Court in the District?

Mr. HULTGREN. As I understood the Court's opinion it was merely venue and not jurisdiction.

The COURT. It is jurisdiction.

Mr. HULTGREN. In that case, I think probably the accused should withdraw his plea and the Government will dismiss——

The COURT, The plea of Guilty may be withdrawn. The case may be dismissed for lack of jurisdiction.

I hereby certify that the foregoing is a true and correct transcript of the original notes as recorded by me before the Honorable J. Joseph Smith, Chief Judge.

(Sgd.) BENJAMIN R. SANDERS,
Official Reporter.

APPENDIX B

United States District Court, District of Connecticut

No. 9407 Criminal

UNITED STATES OF AMERICA

v.

HIGINO DE OLIVEIRA TAVARES

Memorandum of decision

The defendant, an alien crewman, entered the United States at Newport News, Virginia, July 14, 1955, on a conditional permit to land pursuant to Sec. 1282 (a) (1) of Title 8 U. S. C. The defendant's ship sailed foreign on July 23, 1955, but the defendant knowingly and wilfully remained in the United States. He came to the District of Connecticut 32 days after entry. All of the above facts were stipulated in this action based on an information charging the defendant with violation of Sec. 1282 (e), which punishes as a misdemeanant any alien crewman who wilfully remains in the United States in excess of the number of days allowed in any conditional permit.

The sole question before this court is whether this action was properly brought in this district. Art. III, Sec. 2, Par. 3, and Amendment VI of the United States Constitution, Sec. 1329 of Title 8, U. S. C. and Rule 18 of the Federal Rules of Criminal Procedure require that a trial be held in the district in which the violation took place. The exception to this rule is when the commission of the alleged offense took place in more than one district, 18 U. S. C. Sec. 3237,

as in cases "where a crime consists of distinct parts which have different localities * * * or where it may be said there is a continuously moving act commencing with the offender and hence ultimately consumated through him * * * or where there is a confederation in purpose between two or more persons, its execution being by acts elsewhere * * *." *U. S.* v. *Lombardo,* 241 U. S. 73, 77.

Such does not appear to be the case here. The defendant violated Sec. 1282 (c) when he remained in this country after the expiration of his conditional permit, i. e. when his ship sailed. No further act by him or anyone else was required to complete the violation. While it is true that the illegality of defendant's presence in this country is continuous, *U. S.* v. *Anastasio* (D. N. J. 1954), 120 F. Supp. 435, rev. on other grounds 226 F. 2d 912, cert. den. 351 U. S. 931, criminal violations of the immigration acts regulating the entry of aliens have not been regarded as continuous crimes. Cf. *Lazarescu* v. *U. S.* (4 Cir. 1952), 199 F. 2d 898; *U. S.* v. *Vasilatos* (E. D. Pa. 1953) 112 F. Supp. 111, aff. 209 F. 2d 195 (fraudulently procuring entry into this country after prior deportation); *U. S.* v. *Capella* (N. D. Cal. 1909), 169 Fed. 890 (introducing into country a minor unaccompanied by his parents); *U. S.* v. *Lair* (D. Kan. 1910), 177 Fed. 789, rev. on other grounds 195 Fed. 47, cert. den. 229 U. S. 609; *U. S.* v. *Lavoie* (W. D. Wash. 1910), 182 Fed. 943 (importation of female for immoral purposes). This rule is apparently recognized in Sec. 1329 of Title 8 wherein the venue for all crimes under this subchapter is placed at the district of violation with the exception of crimes of fraudulent entry and entry after deportation, which may be tried in the district of apprehension. Such a distinction would be

meaningless if violations such as the one in issue were regarded as continuous.

The information against the defendant is dismissed as brought in the improper district.

Dated at New Haven, Connecticut, this 6th day of May 1957.

J. JOSEPH SMITH,
United States District Judge.

U. S. GOVERNMENT PRINTING OFFICE: 1957